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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

STATE OF ALABAMA, *et al.*,
Petitioners,

v.

Timothy D. POPE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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September 15, 2008

QUESTION PRESENTED

"Numerous federal statutes allow courts to award attorney's fees to the 'prevailing party.'" *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001). The question presented here, which has divided the lower courts, is:

> Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorney's fees—and whose interests are therefore aligned with those of the would-be fee payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes?

The Eighth and Eleventh Circuits have answered yes to this question; the Second, Seventh, and D.C. Circuits have all answered no.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The Petitioners in this Court, defendants-appellants below, are as follows: The State of Alabama and its agencies, boards, commissions, and officials, including the Alcohol Beverage Control Board; the Board of Public Accountancy; the Bureau of Tourism and Travel; the Commission on Aging; the Commission on Physical Fitness; the Department of Agriculture and Industries; the Department of Conservation and Natural Resources; the Department of Corrections; the Department of Economic and Community Affairs; the Department of Education; the Department of Finance; the Department of Human Resources; the Department of Industrial Relations; the Department of Labor; the Department of Mental Health and Mental Retardation; the Department of Public Health; the Department of Rehabilitation Services; the Department of Revenue; the Department of Voter Registration; the Development Office; the Emergency Management Agency; the Industrial Development Training Agency; the Labor Board; the Medicaid Agency; the Retirement Systems of Alabama; the Securities Commission; the State Board of Registrars; the State Docks; the State Personnel Board; the State Personnel Department; Lauderdale County; the Lauderdale County Commission; the Florence/Lauderdale County Emergency Management Agency; and Thomas G. Flowers.

The Respondent in this Court, intervenor/plaintiff-appellee below, is Timothy D. Pope.

Additional parties who participated in the underlying litigation in the district court but did not participate ei-

ther in the ensuing attorney's-fees litigation in the district court or in the court of appeals are as follows:

The United States of America, as the original plaintiff in the underlying litigation, sought and obtained injunctive relief against the State defendants but, as relevant here, jointly moved with the State defendants to terminate a portion of the injunction.

Two groups of individuals intervened to oppose the United States' and State defendants' joint motion to terminate. Those individuals were (1) Eugene Crum, Sylvia S. Adams, Charles E. Archie, Jr., Carolyn Ball, Carol Banks, David Barley, John Bradford, Milton Burton, Pauline Burton, Dorothy C. Carson, Lynn Carter, Clyde Chatman, Charles Chinakwe, Presley W. Coleman, Geneice Smith Crayton, Betty Crum, Grant DeWayne Culliver, Jerome Dangerfield, Velma Easterling, Venus Edwards, Mable Elliott, Cornell Ellis, Glenda Elston, Cecil Fagg, Audrey D. Finch, Samuel Foster, Terry D. Goodson, Katherine Gray-Armster, Brenda Dianne Green, Ricky Grider, Romanza Hamilton, Vivian Handy, Willie Harris, Roy Hightower, Michael Hopkins, Rodney Huntley, Brenda J. Irby, Jacquelyn Jackson-Kelly, Yvonne Jennings, Gladys D. Jones, Theodore Jones, Willie N. Kelly, Deborah Lumpkin, Eddie McCoy, Franklin McMillion, Sr., Kathy Mathews, Roosevelt Mays, Alva Moore, Annie Moore, Wilson Morgan, Benny Newton, Herman Powell, Samuel Price, Laneeta Roberts, Shelia Russell, Layan Said, Annie F. Smith, Robert L. Smith, Lee M. Taylor, Robert Taylor III, Earl Vaughn, Carrie Warren,

Marie Wilson, Tamblyn Witherspoon, Darrell B. Wright, and Earnest Wright; and (2) Johnny Reynolds, Peggy Allen, Martha Boleware, Jeffery Brown, Ouida Maxwell, Cecil Parker, Robert Johnson, and Frank Reed.

Neither any of the Petitioners nor the Respondent is a corporation or has issued any stock that is owned by any publicly traded company.

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The opinion of the district court assessing fees (App. 7a) is reported at ___ F.Supp.2d ___, 2007 WL 2725264 (M.D. Ala. Sept. 17, 2007).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reprinted in the appendix to this petition: 42 U.S.C. §1988(b) and 42 U.S.C. §2000e-5(k).

STATEMENT OF THE CASE

This case presents an important question that has divided the circuits: Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorney's fees—and whose interests are therefore aligned with those of the would-be fee payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes? Here, that question arose when an intervenor, respondent Timothy Pope, sought and obtained an attorney's-fee award against certain Alabama state agencies and officials following a successful effort—jointly prosecuted by Pope and those same

state agencies and officials—to modify an injunction pursuant to which a federal district court has been supervising the employment practices of Alabama government departments for nearly 40 years.

A. The *Frazer* Litigation And The No-Bypass Rule

In 1968, the United States brought an enforcement action in federal district court against the Alabama State Personnel Board and the heads of several state agencies (hereinafter, "the State" or "the State defendants") alleging a pattern or practice of racial discrimination in employment. The district court found the State defendants liable and entered a comprehensive injunction to remedy the unlawful discrimination. *See United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970). By subsequent orders entered in 1973 and 1976, the injunctive relief was extended to virtually all state agencies. *See United States v. Frazer*, 1976 WL 729 (M.D. Ala. 1976).

As the Eleventh Circuit explained below, the injunction entered by the district court in *Frazer* established "an extensive remedial framework to redress discrimination." App. 2a. Among the injunction's many specific provisions, one came to be known as the "No-Bypass Rule." That rule generally prohibited state agencies making hiring and promotion decisions from "appoint[ing] or offer[ing] a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant." *Frazer*, 317 F. Supp. at 1091.

B. Termination Of The No-Bypass Rule

The No-Bypass Rule operated continuously and without court review for some 37 years—until, in the litigation that underlies the attorney's-fee request in this case, the district court preliminarily suspended and then permanently terminated it. Because a proper understanding of the Question Presented here requires familiarity with the history of the No-Bypass Rule's termination, we set the stage in some detail below. All material facts are undisputed.

1. *Development of the Evidentiary Record.* To begin with, as the Eleventh Circuit acknowledged in its decision, it is "undisputed" that "the State defendants commenced a review of the continuing necessity of the No-bypass Rule in May 2002, well *before* Pope moved to intervene" in the *Frazer* action. App. 2a (emphasis in original). In particular, the State hired experts who prepared a "detailed (and costly) statistical analysis of the racial composition and recent racial hiring patterns in the Alabama public workforce." *Id.* The project consumed the full-time efforts of several economists, computer programmers, and research associates over a two-month period at a cost of several hundred thousand dollars to the State. Doc. 748, Ex. A, ¶¶4-5 (Aff. of A. Byrne). In their analyses, the State's experts found that there had been a substantial increase in the representation of black employees in the State workforce during the life of the No-Bypass Rule; that the increase was particularly significant among managers and supervisors; and that the rate of selections of black candidates from civil-service registers exceeded the predicted number of such selections. *Id.* ¶5.

Based on these findings, the State defendants discussed with other State officials a proposal to terminate the No-Bypass Rule. *Id.* ¶6. In addition, "[o]n 11 February 2003, the State defendants began discussions with the United States about the results of the statistical analysis and proposed to file a joint motion to terminate the No-bypass rule on the grounds that the problems addressed in the Frazer litigation had been remedied." App. 2a.

2. *Pope's Intervention and the Motions To Terminate.* In late February 2003, while the State's discussions with the United States were ongoing, Pope, a white state employee whose promotion had been rescinded as violative of the No-Bypass Rule,[1] moved to intervene in the *Frazer* action "for the purpose of seeking modification or vacation of certain portions of the [district court's] injunctive orders." Doc. 605, p.1. The district court took no immediate action on Pope's motion.[2]

On May 20, 2003, following a thorough review of the evidence developed by the State's experts, the United

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[1] Pope sued separately, alleging that the State had violated Title VII and the Equal Protection Clause by rescinding his promotion. A federal district court recently rejected Pope's claims. *See Pope v. Alabama*, No. 2:03cv199-ID, 2008 WL 2874483 (M.D. Ala. July 24, 2008). Pope has appealed.

[2] The issue of how Pope came to intervene is disputed. The State defendants introduced an affidavit from the Personnel Department's general counsel attesting that Pope's counsel told her "in unambiguous terms" that he was intervening in the case in order to "claim-jump" the State and "hijack[] the litigation to obtain attorney's fees." Doc. 748, Exh. 1, ¶8. Pope's lawyer countered with his own affidavit, in which he denied the claim-jumping allegation and testified that he was independently pursuing Pope's claim without knowledge of the State defendants' ongoing work. Doc. 750, Exh. A, ¶¶3, 7-8. This dispute is immaterial to the Question Presented.

States (as the original plaintiff) and the State defendants jointly moved to terminate the No-Bypass Rule on the ground that the "discriminatory practices requiring the implementation of the No-Bypass Rule have ceased and the effects of such practices have been remedied." Doc. 634, pp.1-2. The United States and the State defendants also filed briefs opposing Pope's intervention as unnecessary; his interests, they said, "were adequately represented by the existing parties." App. 3a. As the State explained, "[Pope's] interest and the interest of the present parties are identical—both Pope and the current parties to this action seek to terminate the rule." Doc. 633, p.2; *accord* Doc. 632, p.4 (U.S. Brief) ("Pope seeks to terminate the no-bypass rule. The existing parties seek to terminate the no-bypass rule."). Thus, from the very outset of this litigation, the interests of the United States, the State defendants and Pope have, as relevant here, been squarely aligned.

In response to the United States' and the State defendants' joint motion to terminate, two groups of black plaintiffs in ongoing employment suits against the State—whom we will call the "*Crum-Reynolds*" parties after the styles of their cases—also moved to intervene in the *Frazer* litigation, specifically to oppose the No-Bypass Rule's termination. Docs. 637, 638.

The district court thereafter ordered the "proposed intervenors"—*i.e.*, Pope and the *Crum-Reynolds* plaintiffs—to "show cause ... why the joint motion to terminate" filed by the United States and the State defendants "should not be granted." Doc. 640, p.1. The would-be *Crum-Reynolds* intervenors filed briefs opposing the joint motion. Docs. 651, 652. Pope, still a putative intervenor, filed a brief "in support of the Joint Mo-

tion," which he argued "should be granted." Doc. 648, p.1.

Following a period of inactivity, in January 2004—roughly eight months after the United States and the State defendants had jointly moved to terminate the Rule—the district court permitted both Pope and the *Crum-Reynolds* parties to intervene. Docs. 655, 656, 661. Pope then "filed a complaint-in-intervention and a motion seeking, essentially, to terminate the no-bypass rule," App. 8a, and in so doing "joined the United States and the State defendants in their termination motion," App. 22a; App. 27a-28a (same). Some six weeks later, the *Crum-Reynolds* intervenors also filed complaints-in-intervention; they urged the district court to "[d]eny all requests to vacate or modify" the No-Bypass Rule. Doc. 666, p.25; Doc. 667, p.18. Notably, *all* intervenors—both Pope on one side and the *Crum-Reynolds* parties on the other—asked the district court (using the very same words, verbatim) to "[g]rant the plaintiff-intervenors an award of all costs and expenses, including an award of reasonable attorney's fees." Doc. 659, p.10; Doc. 666, p.26; Doc. 667, p.19.

After the parties engaged in discovery concerning the State defendants' statistical evidence, the district court in April 2005 entered an order requiring the parties to show cause why "plaintiff United States of America and the state defendants' joint motion to terminate the no-bypass rule and plaintiff-intervenor Timothy Pope's motion to modify injunction as to the no-bypass rule should not be treated as also requests for preliminary relief" and granted. App. 31a. In so doing, the district court emphasized that as a "race-conscious provision" the No-Bypass Rule "must meet 'strict scrutiny' standards and must be 'narrowly tailored'" and, further,

that "the evidentiary record submitted by [the] United States and the state defendants shows a strong likelihood that, when all is said and done, the rule cannot continue." App. 29a (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)). Accordingly, the court held, there was a "strong likelihood ... that the United States, the state defendants, and Pope will prevail on the merits of their motions" to terminate. App. 30a.

3. *Suspension and Termination of the No-Bypass Rule.* In an order dated May 20, 2005, the district court concluded that "the State defendants and Pope have established 'that a significant change in circumstances warrants' a suspension of the no-bypass rule." App. 32a-33a (quoting *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992)). Accordingly, the court converted the United States' and State defendants' joint motion to terminate into a motion for preliminary relief and granted it, thereby temporarily suspending the Rule's operation. App. 34a. The district court simultaneously granted Pope's motion seeking identical relief. *Id.*

The State defendants and Pope thereafter filed separate summary-judgment motions seeking permanent termination of the No-Bypass Rule. In an opinion issued June 30, 2006, the district court granted those motions, as well as the United States' and State defendants' May 2003 joint motion to terminate and Pope's January 2004 motion to modify. App. 24a-25a. In finding that "there ha[d] been a 'significant change in [factual] circumstances'" and that "termination of the no-bypass rule [was] 'suitably tailored' to these changed circumstances," the court pointed, specifically, to the statistical evidence developed by the State defendants, which established that during the 35-year life of the Rule, there had been

both a substantial increase in the representation of African-Americans in the State workforce and a significant redistribution of African-Americans into higher paying jobs. App. 22a-23a (quoting *Rufo*, 502 U.S. at 383).

C. Pope's Motions For Attorney's Fees

Claiming to be a "prevailing party" within the meaning of 42 U.S.C. §1988(b) and Title VII's fee-shifting provision, 42 U.S.C. §2000e-5(k), Pope sought attorney's fees totaling more than $105,000 from the State defendants. Initially, after the district court preliminarily suspended the No-Bypass Rule, Pope moved for an "interim award" of attorney's fees. Doc. 740. The State defendants objected on the ground that they had never "opposed [Pope's] motion to terminate the no-bypass rule" and, to the contrary, had filed their own "joint motion with the original Plaintiff United States to terminate" the Rule. Doc. 748, p.2. Accordingly, the State defendants contended, whatever else his status, Pope was "not a 'prevailing party' *vis-à-vis*" them. *Id.* When Pope later filed a supplemental fee petition after the district court permanently terminated the No-Bypass Rule, *see* Doc. 781, the State defendants again protested that their interests were squarely aligned with Pope's, that they had prevailed on the termination issue, and, therefore, that they were not losing parties liable for fees, *see* Doc. 782.[3]

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[3] Pope did not seek attorney's fees from the *Crum-Reynolds* intervenors—the only losing parties to speak of—presumably because he doubted he could show that their position was "frivolous, unreasonable, or without foundation," as required by this Court's decision in *Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989).

D. The District Court's Fee Opinion

The district court granted Pope's fee petitions in part. App. 7a-20a. The court rejected the State defendants' core argument that Pope was not a "prevailing party" *vis-à-vis* them because their interests were aligned with his and because they had prevailed on the termination issue. App. 13a. The court found that because Pope had "achieved a sought-after 'judicially sanctioned change in the legal relationship of the parties'" he was *ipso facto* a prevailing party, even as against the State. *Id.* (quoting *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001)). The facts that the parties were aligned and that the State defendants had themselves prevailed were, in the district court's view, irrelevant: "While Pope may not have achieved the sought-after change by himself, he still achieved it. Pope is a prevailing party." *Id.*

Having summarily concluded that Pope was entitled to fees—and, more to the point, that the State defendants were liable for them—the district court spent some nine pages sifting through disputed evidentiary submissions in an attempt to fix the amount of the award. In doing so, the district court focused principally on "whether Pope made a separate contribution to the litigation, and, if so, what it was." App. 14a. Accordingly, the court sought to determine the timing of each party's involvement, to parse the subtle distinctions between the parties' legal arguments, and to measure when and to what extent the court's own analysis was "driven more" by one party's submissions or the other's. App. 14a-20a. As a result of this fact-intensive investigation, the district court concluded that Pope was entitled to 70% of the fees claimed in connection with the preliminary-

suspension phase of the litigation and 40% of those claimed in connection with the permanent-termination phase, for a total of $61,499.70. App. 17a-20a.

E. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed. Like the district court, the Eleventh Circuit rejected the State defendants' contention that they were not liable for fees because Pope was not a "prevailing party vis-à-vis [them]" and, in particular, because "the interests of the State and Pope were aligned" and "both parties were successful in their efforts to terminate the No-bypass rule." App. 3a. All that mattered, the court of appeals held, was that "[a]s a consequence of litigation acts taken by Pope and the State defendants, the No-bypass Rule ha[d] been terminated judicially" and that, accordingly, Pope had obtained a "'judicially sanctioned change in the legal relationship of the parties'" App. 4a (quoting *Buckhannon*, 532 U.S. at 605). That alone was enough to make Pope a "prevailing party," even as against the aligned, prevailing State defendants. *Id.* at 4a-5a.

In dismissing the State's argument, the Eleventh Circuit refused, in its words, "to engraft" onto federal fee-shifting statutes "a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status." App. 5a. Despite the State's reliance on cases (of which more below) from the Second, Seventh, and D.C. Circuits expressly holding that aligned, prevailing parties cannot be made liable for attorney's-fee awards, the Eleventh Circuit held that there is "nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing pos-

ture." *Id.*[4] The court of appeals went on to affirm the district court's determinations that Pope had "made a separate contribution to the litigation" and that no "special circumstances render[ed] a fee award unjust," as well as its calculation of the fee amount. App. 5a-6a.

REASONS FOR GRANTING THE PETITION

Over the course of the last 40 years, this Court has given careful attention to the meaning of the term "prevailing party" as used in scores of federal fee-shifting statutes. In a series of decisions—beginning with *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), and culminating with *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001)—the Court held that to qualify for a fee award, a party must "'succeed on [a] significant issue in litigation which achieves some of the benefit the part[y] sought'" in the case, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted), and, in so doing, must obtain a "judicially sanctioned change"—by way of either a court judgment or consent decree—"in the legal relationship of the parties," *Buckhannon*, 532 U.S. at 605.

To this point, the Court's attention has almost uniformly been focused on the party *seeking* fees. The question here is whether the term "prevailing party" can be defined wholly without regard to the other side of the "*v.*" Who, in other words, is liable to *pay* attorney's fees

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[4] The Eleventh Circuit distinguished an in-circuit decision cited by the State, *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986). Unlike this case, in which the State took sides (as it turned out, the winning side) and litigated forcefully, the defendants in *Reeves* "remained neutral" with respect to the contested issue. App. 5a n.2.

under federal fee-shifting statutes? And in particular, is it only losing parties who are subject to fee awards, or can a litigant whose interests are aligned with the fee seeker's (and who therefore itself "prevail[s]" in the litigation) also be put on the hook? That question has received scant attention from this Court, and the uncertainty has spawned a circuit split: The Eighth and Eleventh Circuits allow the assessment of fee awards against aligned, prevailing parties, while the Second, Seventh, and D.C. Circuits require adverseness (or, what amounts to the same thing, a *loss*) as a prerequisite to fee liability.

The Question Presented significantly affects real-world, on-the-ground litigation under a whole host of federal statutes. This Court should step in now to provide necessary guidance to plaintiffs, defendants, and intervenors, as well as to the practicing bar.

I. The Eleventh Circuit's Decision Deepens An Existing Circuit Split.

In arguing to the Eleventh Circuit that "the prevailing party requirement is not met when the interests of both parties are aligned and both seek the same ultimate objective in the litigation," the State defendants cited, among other supporting authorities, on-point decisions of the Second, Seventh, and D.C. Circuits. Br. of Appellants at 21, 27-29, *Flowers v. Pope*, No. 07-14854 (Dec. 7, 2007). The Eleventh Circuit, however, expressly rejected the State's contention: "The State defendants seek to engraft a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status. But we see nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture." App. 5a. In so

holding, the Eleventh Circuit deepened an existing circuit split that now warrants this Court's attention. *See* Sup. Ct. R. 10(a).

A. The Second, Seventh, And D.C. Circuits Have Adopted A "Loser-Pays" Rule That Precludes Fee Awards Against Aligned, Prevailing Parties.

The Second, Seventh, and D.C. Circuits have all held that attorney's fees may not be assessed against a litigant who is aligned with—and who prevails to the same extent as—the party seeking the fees. Those courts, in other words, have all adopted what amounts to a "loser-pays" rule to govern fee awards.

1. In *Firebird Society v. Members of the Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977), the Second Circuit disallowed a plaintiff's request for attorney's fees pertaining to a particular issue with respect to which the plaintiff's and defendant's interests were aligned. *Firebird Society* arose out of a Title VII suit brought by black firefighters against the City of New Haven's fire commissioners challenging the fire department's employment practices. After the case was resolved by consent decree, a separate group of firefighters moved "to intervene and set aside the consent order." *Id.* at 643. Their intervention "was successfully resisted"—significantly, "not only by the appellant [black firefighters] but by the appellee [fire commissioners] as well." *Id.* The Second Circuit rejected as "clearly without merit" the black firefighters' claim "that counsel fees should be assessed against the appellees for services opposing the intervention." *Id.* at 644. In particular, the court reasoned as follows: "The appellees joined in opposing intervention and as to that issue were as much

prevailing parties as the appellants. There is no viable theory advanced which would permit the recovery of legal fees and costs in these circumstances." *Id.*; *see also* 2 Alba Conte, *Attorney Fee Awards* § 11:3, at 647-48 n.41 (3d ed. 2004) (In *Firebird Society* "[f]ees were denied ... for time spent in successfully opposing motions to intervene when filed by persons who challenged the settlement because the defendant also prevailed on this issue.").[5]

2. The D.C. Circuit has likewise adopted a loser-pays rule and held that alignment precludes attorney's-fee liability. In *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211 (D.C. Cir. 1984), the court addressed a fee request arising out of litigation concerning the regulation of cigarette smoking aboard commercial aircraft. Having successfully challenged Civil Aeronautics Board regulations as insufficiently protective of the rights of non-smoking airline passengers, the public-interest group Action on Smoking and Health ("ASH") sought and obtained attorney's fees under the Equal Access to Justice Act, which, like so many other fee-shifting statutes, authorizes fee awards to "prevailing part[ies]." 28 U.S.C. §2412(d)(1)(A). Significantly for present purposes, however, the D.C. Circuit disallowed the portion of the fee award attributable to ASH's "work supporting the Board's position against [an industry] intervenor's claim that the Board had no power to regulate smoking aboard aircraft." *ASH*, 724 F.2d at

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[5] *Cf. Association for Retarded Citizens of Conn., Inc. v. Thorne*, 68 F.3d 547, 552 (2d Cir. 1995) ("There is no basis in law or logic for a prevailing party to recover attorneys' fees from a party other than the entity whose behavior has been positively influenced by litigation and *against whom the plaintiffs have prevailed.*" (emphasis added)).

216. Notwithstanding ASH's contention that it had made a separate contribution to the litigation—that "it alone cited a precedent which [the D.C. Circuit had] relied upon in its [earlier] opinion" rejecting the intervenor's contention—the court "agree[d] with the Board that ASH cannot be considered a 'prevailing party' on an issue on which both ASH and the government took the same position." *Id.* Notably, in so holding, the D.C. Circuit cited the Second Circuit's *Firebird Society* decision for support. *Id.* at 216 n.19.[6]

3. The Seventh Circuit, too, has expressly embraced an adverseness/loser-pays prerequisite to attorney's-fee liability. In *Bigby v. City of Chicago*, 927 F.2d 1426 (7th Cir. 1991), the Seventh Circuit affirmed a district court's denial of plaintiffs' request for fees from the defendant for time spent in opposing a separate intervenor's appeal. Briefly, the *Bigby* litigation unfolded as follows: A class of black police officers sued the City of Chicago under Title VII alleging that a test used for departmental promotions was racially biased. A class of white officers intervened to support the test. The black plaintiffs prevailed, and the district court imposed hiring and promotion quotas but permitted the City to continue to make promotions from the challenged list until a new test could be devised. *See id.* at 1427. Several years later, the district court enjoined the City, still without a nondiscriminatory test, from making further promotions from the old list. When the City thereafter sought leave

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[6] *See also Synar v. United States*, 670 F. Supp. 410, 413-14 (D.D.C. 1987) (citing *ASH* and holding in an EAJA case that "[i]t cannot be stated with accuracy that plaintiffs 'prevailed' over the United States" where "both plaintiffs and the United States *agreed* upon the 'winning' issue of the case" and, therefore, that "the prevailing legal issue was put forth by *both* parties" (emphasis in original)).

to continue making promotions, the district court refused. The white intervenors appealed the district court's refusal, but the City did not. The City, rather, "appeared as an appellee in the ... intervenors' appeal" alongside the black plaintiffs and, with them, succeeded in getting the appeal dismissed. *Id.* at 1429.

The Seventh Circuit refused the plaintiffs' subsequent request under 42 U.S.C. §2000e-5(k) for fees based on their time spent opposing the intervenors' appeal. Its reasoning applies here jot for jot:

> In this instance, the Bigby plaintiffs are not prevailing parties as against the City on the appeal by the [white] intervenors. ... Since the Bigby plaintiffs and the City each argued that the appeal by the [white] intervenors was improper, the Bigby plaintiffs cannot be characterized as prevailing parties vis-à-vis the City with respect to the dismissal of the appeal. The City was as much a prevailing party when the appeal was dismissed as were the Bigby plaintiffs; therefore, the Bigby plaintiffs do not qualify for an award of attorney's fees under §2000e-5(k).

Bigby, 927 F.2d at 1429. Significantly, in support of its holding, the *Bigby* court cited the D.C. Circuit's *ASH* decision for the proposition that a "plaintiff [is] not considered a prevailing party on an issue upon which it took the same position as the defendant." *Id.*

B. The Eighth And Eleventh Circuits Have Rejected A "Loser-Pays" Limitation And Permit Fee Awards Against Aligned, Prevailing Parties.

In stark contrast to the loser-pays rule that governs attorney's-fee requests in the Second, Seventh, and D.C. Circuits, the Eighth and Eleventh Circuits both permit fee awards against parties who are aligned with—and prevail to the same extent as—the fee seeker.

1. As already described in some detail, in the decision below the Eleventh Circuit expressly rejected a loser-pays limitation on fee liability. The court found the State liable for fees by focusing exclusively on Pope as the fee seeker, and ignoring entirely the status of the State as would-be fee payer. "As a consequence of litigation acts taken by Pope and the State defendants," the Eleventh Circuit reasoned, "the No-bypass rule has been terminated judicially." App. 4a. Because he obtained—albeit with the State's unconditional support—a "'judicially sanctioned change in the legal relationship of the parties,'" the court found that "Pope was a prevailing party" entitled to fees. *Id.* (quoting *Buckhannon*, 532 U.S. at 605). The court rejected the State defendants' position that Pope was not a "prevailing party vis-à-vis" them because "the interests of the State and Pope were aligned" in that "both parties were successful in their efforts to terminate the No-bypass rule." App. 3a. The court refused, in its words, to "engraft a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status." App. 5a. "[W]e see nothing in the language of section 1988," the court held, "that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture." *Id.* The Elev-

enth Circuit thus concluded that federal fee-shifting statutes do not entail a loser-pays limitation and that even aligned, prevailing parties can be liable for fee awards.

2. In so holding, the Eleventh Circuit joined the Eighth Circuit, which had earlier determined that attorney's fees can be assessed against aligned, prevailing parties. *Jenkins v. Missouri*, 73 F.3d 201 (8th Cir. 1996), arose out of protracted school-desegregation litigation in which black students from an urban school district had alleged that they were denied admission to another district on the basis of race. After the case shuffled back and forth between the district and appellate courts for several years, the district court eventually approved a remedy crafted by a court-appointed Desegregation Monitoring Committee. The black plaintiffs and the government defendants were united in their opposition to the proposed remedy, which involved, in part, electronic communications between urban and suburban students. They jointly "appealed from the entry of the [remedial] order" and succeeded in convincing the Eighth Circuit to vacate. *Id.* at 202. The black plaintiffs then sought attorney's fees from the State for the plaintiffs' "role in opposing the [remedial] program" on appeal. *Id.* The district court awarded fees, and held, specifically, that under Eighth Circuit precedent "whether the State opposed the [remedial] program was not a relevant factor in deciding whether to award fees." *Id.*

In affirming, the Eighth Circuit squarely rejected the State's contention that "the district court could not award the Jenkins class fees against the State for opposing the [remedial] plan, since the State as well as the Jenkins class opposed the plan." *Id.* at 204. In so doing, the Eighth Circuit likewise rejected the State's reliance

on, among others, the Second Circuit's *Firebird Society* decision, the D.C. Circuit's *ASH* decision, and the Seventh Circuit's *Bigby* decision: "If these cases hold that a court can only award attorneys' fees against a defendant if the fees were incurred directly litigating against the defendant, they conflict with" existing Eighth Circuit precedent. *Id.* The Eighth Circuit held that the policies supporting fee awards in institutional-reform cases applied "despite the fact that the State joined the Jenkins class in opposing" the remedial plan. *Id.*

* * *

The circuit split here is clear, mature, and acknowledged. Moreover, it is most unlikely that the split will resolve itself, given that courts most recently weighing in—the Eighth and Eleventh Circuits—have rejected the majority view and held that aligned, prevailing parties *can* be liable for fees. Finally, as we explain in some detail below, uncertainty in the attorney's-fees realm is particularly troublesome inasmuch as it encourages the proliferation of fee-related "second major litigation[s]" of the sort this Court has condemned. *Hensley*, 461 U.S. at 437. This Court should grant certiorari to resolve the conflict.

II. The Eleventh Circuit's Decision Conflicts With This Court's Decisions Concerning Fee Liability And Frustrates The Policies That Underlie Federal Fee-Shifting Statutes.

The circuit split is reason enough to grant certiorari. Review here is particularly appropriate, however, because the Eleventh Circuit's decision is wrong: It conflicts with statements in this Court's opinions and un-

dermines basic principles of systemic efficiency and fundamental fairness.

A. This Court's Decisions Indicate That Aligned, Prevailing Parties Are Not Liable For Attorney's Fees.

In addition to exacerbating a circuit split, the Eleventh Circuit's decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Although this Court has never said so expressly—hence the division among the lower courts—its entire attorney's-fees jurisprudence rests on the assumption that federal fee-shifting statutes codify a loser-pays system.

In assessing fees against aligned, prevailing parties, the Eleventh Circuit found it dispositive that 42 U.S.C. §1988 does not on its face forbid that result: "[W]e see nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture." App. 5a. But this Court has rejected such a wooden interpretation of federal fee-shifting statutes. For instance, addressing Title VII's fee-shifting measure in *Independent Federation of Flight Attendants v. Zipes*, the Court emphasized that "[a]lthough the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits." 491 U.S. 754, 758 (1989) . More particularly, the Court said that "[i]n the case of [42 U.S.C. §2000e-5(k)] and other fee-shifting statutes"—expressly including §1988—"we have found limits in 'the large objectives' of the relevant Act, which embrace certain 'equitable considerations.'" *Id.* at 758-59 (citations omitted).

One of those "limits," this Court's decisions clearly indicate, is that only *losers* are liable for attorney's fees. *Kentucky v. Graham*, 473 U.S. 159 (1985), provides perhaps the clearest signal to that effect. The question there was whether §1988 authorizes an award of fees against a government entity when a plaintiff prevails in a personal-capacity suit against government employees. In answering no, the Court (anticipating its later *Zipes* decision) acknowledged that "Section 1988 does not in so many words define the parties who must bear" attorney's fees. *Id.* at 164. Nonetheless, the Court added immediately, "it is clear that the logical place to look for recovery of fees is to the *losing party*—the party legally responsible for relief on the merits." *Id.* at 165 (emphasis added). "Thus," the Court concluded, "where a defendant has not been *prevailed against*, either because of legal immunity or on the merits, §1988 does not authorize a fee award against that defendant." *Id.* (emphasis added); *accord id.* at 168 ("That a plaintiff has prevailed against one party does not entitle him to fees from another party ...."). Even though the plaintiffs there had prevailed on their underlying claim (excessive force) against various government employees (police officers), they had not "prevailed against" the State so as to make the State itself liable for fees.

Accordingly, the Eleventh Circuit's concluding observation that there is "nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture" (App. 5a) actually concludes nothing at all. This Court made precisely the same observation in *Graham*—that "Section 1988 does not in so many words define the parties who must bear" attorney's fees—and yet went on to hold that because the State was

not a "losing party" who had been "prevailed against," it was not liable for fees. 473 U.S. at 164-64. *Graham* thus clearly indicates that adverseness, *i.e.*, losing and being prevailed against, is an essential prerequisite to statutory fee liability. And by definition, a party (like the State here) whose interests are precisely aligned with those of the fee seeker and who obtains the very relief it requests has neither lost nor been prevailed against.

Graham reflects an assumption that underlies this Court's entire attorney's-fees jurisprudence. From the very beginning, this Court's opinions have indicated that federal fee-shifting statutes establish a loser-pays system. For instance—

- In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Court described the "American rule"—to which fee-shifting statutes are exceptions—as prescribing that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee *from the loser*." 421 U.S. 240, 247 (1975) (emphasis added).

- In *Monell v. Department of Social Services of New York*, the Court summarized §1988 as "allow[ing] prevailing parties ... in §1983 suits to obtain attorney's fees from the *losing parties*." 436 U.S. 658, 698 (1978) (emphasis added).

- In *New York Gaslight Club, Inc. v. Carey*, the Court remarked that Title VII's fee-shifting provision "subject[s] the *losing party* to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings." 447 U.S. 54, 61 (1980) (emphasis added).

- In *Zipes*, the Court repeatedly referred to those liable for fee awards as "losing defendant[s]." 491 U.S. at 759, 761 (emphasis added).

- In *Venegas v. Mitchell*, the Court observed that "§1988 controls what the *losing defendant* must pay ...." 495 U.S. 82, 90 (1990) (emphasis added).

- In *West Virginia University Hospitals, Inc. v. Casey*, the Court considered the question whether expert fees could "be shifted to the *losing party* pursuant to" §1988 and characterized *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989), as holding that paralegal and law-clerk time could be "charged to the *losing party*." *Casey*, 499 U.S. 84, 99 (1991) (emphasis added).

In the same way (and to the same effect), this Court's decisions have recognized an adverseness prerequisite to fee liability under federal fee-shifting statutes. For instance—

- In *Christiansburg Garment Co. v. EEOC*, the Court prescribed the circumstances in which "a plaintiff [can] be assessed his *opponent's* attorney's fees" under Title VII's fee-shifting provision. 434 U.S. 412, 422 (1978) (emphasis added).

- In *Blum v. Stenson*, the Court observed that a "prevailing party in a §1983 case" may be "entitled to an award of attorney's fees from [his] *adversary*." 465 U.S. 886, 901 n.17 (1984) (emphasis added).

- In *Evans v. Jeff D.*, the Court referred to "a defendant's liability for his *opponent's* attorney's

fees" under §1988. 475 U.S. 717, 736 (1986) (emphasis added).

- In *Gisbrecht v. Barnhart*, the Court summarized §1988 as "allow[ing] a 'prevailing party' to recover from his *adversary* 'a reasonable attorney's fee as part of the costs.'" 535 U.S. 789, 792-93 (2002) (emphasis added).

Not surprisingly, government reports, academic treatises, and other secondary sources reflect the same basic assumptions: that federal fee-shifting statutes entail an adverseness requirement and subject only losing parties to attorney's-fee awards and, conversely, that aligned, prevailing parties are not liable for fees. *See, e.g.*, Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 16 (Federal Judicial Center, 2d ed. 2005) ("Any *losing defendant*, including the government or government officials, can be liable for fees." (emphasis added)); *id.* at 1 ("Congress enacted statutes providing for the prevailing party to recover attorneys' fees *from its opponent* in particular kinds of actions." (emphasis added)); Henry Cohen, *CRS Report for Congress: Awards of Attorneys' Fees by Federal Courts and Federal Agencies* 1 (Congressional Research Service 2008) ("Under [fee-shifting statutes], a federal court ... may order the *losing party* to a lawsuit to pay the winning party's attorneys' fees." (emphasis added)); *id.* (describing fee-shifting statutes as embodying a "'loser-pays' rule"); 3 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation* §10.33, at 10-112 (4th ed. 2007) ("Attorney's fees under §1988 are awarded against the losing party ...."); 2 Conte, *supra*, §7.42, at 307 ("Attorney's fees under §1988 are assessed against losing parties ...."); Eugene Gressman, Kenneth S. Geller, et al., *Supreme Court Practice* §15.10, at 830 (9th ed. 2007)

("[A] number of statutes provide for attorneys' fees for the prevailing party against the losing party."); Ralph V. Seep, *What Persons or Entities May Be Liable To Pay Attorney's Fees Awarded Under Civil Rights Attorney's Fees Awards Act of 1976?*, 106 A.L.R. Fed. 636, 643 (1992) (noting "the general rule that the losing party pays fees").

The Eleventh Circuit's decision here—awarding fees against aligned, prevailing parties—cannot be reconciled with this Court's decisions or with the overwhelming weight of authority concerning the proper interpretation of federal fee-shifting statutes.

B. A Rule Making Aligned, Prevailing Parties Liable For Attorney's Fees Is Both Inefficient And Unfair.

A rule assessing fees against an aligned party who, alongside the fee seeker, prevails on the pertinent issue "would so 'distort' the 'fair adversary process' that Congress [sh]ould not lightly be assumed to have intended it." *Zipes*, 491 U.S. at 760 (quoting *Christiansburg Garment*, 434 U.S. at 419). In particular, such a rule would at once produce both systemic inefficiency and gross inequity.

1. This Court has emphasized that judges managing long-running and often unwieldy injunctive decrees need and expect litigants—and particularly government litigants—to shoot straight with them. *See, e.g., Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004). Fee-shifting statutes, therefore, should be interpreted in a way that encourages parties to be proactive, transparent, and cooperative. Unfortunately, the Eleventh Circuit's interpretation does just the opposite. If a defendant in an insti-

tutional-litigation setting can align itself with the plaintiff on a particular issue, prevail on that issue, and yet *still* be stuck with the plaintiff's attorney's fees, the defendant will have every incentive to hide its cards or, worse, decline to participate altogether. It is common ground here that a litigant can avoid fee liability altogether by "remain[ing] neutral" on a contested issue. App. 5a; *see also, e.g.*, *Reeves v. Harrell*, 791 F.2d 1481, 1483-84 (11th Cir. 1986); *Paradise v. McHenry*, 809 F. Supp. 899, 904-06 (M.D. Ala. 1992). But when the goal is the fair and efficient resolution of a protracted dispute, neutrality—and particularly a neutrality born of pocketbook protectionism—is not the best policy. As this Court has said in an only slightly different context, "[i]t would hardly serve the congressional policy in favor of 'vigorous' adversary proceedings" to require litigants to "disguise or avoid their strongest arguments in order to escape liability for attorney's fees." *Zipes*, 491 U.S. at 766 (quoting *Christiansburg Garment*, 434 U.S. at 419). The Eleventh Circuit's rule does just that.

To its credit, the State didn't "disguise or avoid" arguments or otherwise hide the ball here. Instead, it invested several months of manpower and several hundred thousand dollars of taxpayer money into assessing the progress made under the *Frazer* decree—and then, based on the results of its investigation, helpfully (and as it turns out correctly) alerted the district court that changed legal and factual circumstances had likely rendered the decree's No-Bypass Rule invalid and, accordingly, that a modification under *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), was in order. For its efforts in assisting the court in the management of a sprawling, 40-year-old decree—and despite its complete success—the State has now been saddled with

Pope's fees and costs in addition to its own. Particularly in the institutional-reform setting, in which the need for party participation and cooperation is paramount, litigants should be rewarded, not punished, for seeking modifications of orders that, over time, have become unsupportable.

2. Relatedly, the Eleventh Circuit's decision creates an inequitable "lose-lose" proposition that exposes defendants in multiparty litigation to fee liability no matter what their position. As matters stand, the State has been charged with Pope's attorney's fees notwithstanding the fact that the State's interests were squarely aligned with Pope's and that the State prevailed to precisely the same extent as Pope. Had the litigation turned out differently and the *Crum-Reynolds* intervenors succeeded in defending the No-Bypass Rule, they would of course (and rightly) have looked to the State, as the loser, to pay their attorney's fees. So under the Eleventh Circuit's rule, the State was truly damned if it did and damned if it didn't. (Recall that in their preliminary-injunction briefs both Pope and the *Crum-Reynolds* intervenors sought fees against the State. *See supra* at 6.) The only way for the State—and other similarly-situated defendants around the country—to protect against fee liability would be to stand mute. For reasons already explained, Congress cannot possibly have meant to encourage such sideline-sitting.

3. Finally, the Eleventh Circuit's decision will perversely incentivize interloping intervenors to insinuate themselves into existing litigation, piggyback on others' arguments, and then seek reimbursement for their attorney's fees. Whether or not Pope himself was an interloper—whether or not he intervened specifically to "claim jump" the State and "hijack[] the litigation to ob-

tain attorney's fees"[7]—is irrelevant. The chronology of events here, which is undisputed, demonstrates that the risk is real. The point is that the Eleventh Circuit's decision—which makes fees available even to an intervenor who requests the very same relief as the co-party from whom he seeks payment—will encourage opportunistic would-be intervenors to troll.

III. The Question Presented Is Important And Warrants This Court's Attention Now.

The Question Presented here, while "an intellectually interesting and solid problem," is hardly "academic or ... episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Quite the contrary, the issue at the core of this case—Who is liable to pay attorney's fees under federal fee-shifting statutes?—is one whose implications cut across numerous areas of the law and that can be expected to recur in a host of cases. It is, in short, "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).[8]

A. The Question Presented Is Jurisprudentially And Practically Significant.

1. With respect to importance, the sheer numbers tell part of the story. As an initial matter, "[a]lmost 200 civil statutes authorize fee awards to prevailing plaintiffs and, in some cases, prevailing defendants." Hirsch & Sheehey, *supra*, at 1; *see also* Cohen, *supra*, at i (same); *cf. Marek v. Chesny*, 473 U.S. 1, 44 (1985) (appendix to

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[7] *Supra* at 4 n.2.

[8] Reflecting the real-world importance of the Question Presented, groups of States and local governments have filed *amicus curiae* briefs in support of the petition.

opinion of Brennan, J., dissenting) (listing fee-shifting statutes). Among the more significant federal statutes that allow for fee awards to "prevailing part[ies]" are—

- the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988(b);
- Titles II, III, and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-3(b), 2000b-1, 2000e-5(k);
- the Voting Rights Act of 1965, 42 U.S.C. §1973l(e);
- the Equal Access to Justice Act, 28 U.S.C. §2412(d)(1)(A);
- the Individuals With Disabilities Education Act, 20 U.S.C. §1415(i)(3)(B);
- the Americans With Disabilities Act of 1990, 42 U.S.C. §12205;
- the Fair Housing Act, 42 U.S.C. §3613(c)(2);
- the Clean Water Act, 33 U.S.C. §1365(d); and
- the Copyright Act of 1976, 17 U.S.C. §505.

Significantly, this Court has often emphasized that in the light of their similar language it will "interpret[] these fee-shifting provisions consistently." *Buckhannon*, 532 U.S. at 603 n.4 (citing *Hensley*, 461 U.S. at 433 n.7). Accordingly, the uncertainty that exists in this case over whether an aligned, prevailing party can be assessed a co-party's attorney's fees necessarily exists in numerous other contexts, as well. The question is open, so to speak, not just for §1988 and Title VII purposes, but across the board. On the flip side, of course, any resolution of the issue that this Court might reach—either

way—would bring needed clarity to a whole host of statutory regimes. The fact that the question arises in so many different settings, and that the payoff for definitively answering it is so big, provides good reason to grant certiorari. *See, e.g.*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 & n.1 (1983).

2. Not only does the Question Presented implicate scores of federal statutes, but it can be expected to recur frequently given the number of institutional injunctions and consent decrees presently in effect around the country. While the question of an aligned party's fee liability could surface, of course, in a whole host of contexts, it is perhaps most likely to arise in the institutional-reform setting. The reason is this: Because institutional-reform decrees "often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased." *Rufo*, 502 U.S. at 380. When those inevitable changes come, one or more parties to the decree may—as happened here—move the supervising court to modify the decree's terms. Critically, *every time* a party requests such a modification, the possibility arises under the Eleventh Circuit's rule that an individual or group will seek to intervene, ally itself with the movant, and then seek fees.

The threat is hardly hypothetical. During the last half century, there has been an extraordinary "upsurge in institutional reform litigation." *Id.* Today, institutional-reform decrees apply across the gamut of governmental programs—from corrections to housing, from education to mental-health, from environmental to personnel. *See* Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 4 (Yale 2003). Although, tellingly, "[n]o one knows how many" of these decrees actually exist, com-

mentators put the number in the "thousands." American Enterprise Institute, *Government by Consent Decree?* at 2 (June 9, 2005) (remarks of Sen. Alexander)[9]; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 629 (2006) (referring to the "thousands of federal consent decrees that currently exist"). And, significantly, there is no sign of a slowdown; to the contrary, "[n]ew decrees get issued, piling up on the old, few of which are actually terminated." Sandler & Schoenbrod, *supra*, at 11.

3. Finally, beyond the raw numbers, there is an additional consideration that counsels certiorari here: The cost of uncertainty is particularly high in the attorney's-fees context. This Court has repeatedly lamented excess fee litigation, which Justice Brennan quite correctly described as "one of the least socially productive types of litigation imaginable." *Hensley*, 461 U.S. at 442 (Brennan, J., dissenting). Accordingly, the Court has "avoided an interpretation of the fee-shifting statutes that would have 'spawn[ed] a second litigation of significant dimension.'" *Buckhannon*, 532 U.S. at 609 (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)). The division that presently exists among the lower courts concerning aligned parties' fee liability is a veritable breeding ground for fee disputes. And the Eleventh Circuit's decision, which both exacerbates the disunity and gives a boost to the view that fees *can* be assessed against aligned parties, will likely embolden fee seekers and prompt additional fee litigation, making matters worse. The point is simply this: So long as the door is open to more parties requesting fees, more

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[9] *See* www.aei.org/events/filter.all,eventID.1078/transcript.asp.

parties will request fees. And more fee requests, of course, mean more fee litigation.

The risk that these additional fee disputes will mushroom into "second major litigation[s]," *Hensley*, 461 U.S. at 437, is very real. Because the amount that plaintiffs and intervenors can recoup from aligned defendants will necessarily be tied to the nature and extent of their contributions to the relief obtained, they will nearly *always* find it necessary to engage in "major" fee-related litigation. Reviewing courts will have to scrutinize the coparties' arguments and pleadings to determine, for instance, who was the driving force behind the litigation, who was more (or less) responsible for obtaining the desired relief, and whether one party tried to "claim jump" the other. Those inquiries, in turn, may well necessitate discovery concerning the parties' subjective intentions in filing and pursuing their claims, their communications with one another, and the timing of their key strategic decisions. All of which, of course, will only protract and complicate the already-protracted and complicated litigation concerning the amount of any fee award—and, as happened here, lead to yet a third, "fees on fees" round of litigation. (Pope recently sought and obtained in the Eleventh Circuit a $22,000 fee award for time spent litigating the State's liability for fees.) Fear of such open-ended and "factbound" inquiries—into "the nature and timing" of parties' actions, the "subjective motivations" underlying those actions, etc.—is precisely what led this Court to reject the "catalyst theory" of fees in *Buckhannon*. 532 U.S. at 609-10. The very same considerations are at work here.

The district court's fee opinion here vividly illustrates the problem. The court spent all of a single paragraph in determining that Pope was—despite the parties' align-

ment—a "prevailing party" *vis-à-vis* the State. App. 13a. The court then spent the next *nine pages* trying to determine "whether Pope made a separate contribution to the litigation, and, if so, what it was"; to nail down the timing of each party's involvement; to parse in detail the relatively minor differences between the parties' precise legal arguments; and to gauge the effect of each party's contentions on the court's own decisionmaking process. App. 14a-20a. The district court's analysis is chock full of rules, exceptions, exceptions to exceptions, percentages, tables, tallies, etc.

The point here is not to quibble with the number the district court picked; as the Eleventh Circuit correctly observed, the State does not "challenge ... the district court's attorney's fee calculation" as such. App. 4a. The point is simply that the uncertainty sown by the Eleventh Circuit's decision will only encourage more—and more laborious—"satellite litigation" about fees. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 408 (1990). And that is not a good thing.

This Court should step in now to provide necessary clarity and thereby reduce the needless fee litigation that will continue (and likely snowball) so long as the conflict in the lower courts festers.

B. This Case Presents An Ideal Vehicle For Answering The Question Presented.

For at least three reasons, this case presents an ideal vehicle for answering the Question Presented and resolving the longstanding circuit split.

1. The case presents a pure legal issue; there are no factual disputes that might complicate the Court's consideration. The State defendants have consistently

maintained that "as a matter of law" they are not liable for fees, App. 3a, 4a, either as a *per se* matter or because alignment constitutes a "special circumstance" that precludes a fee award, App. 5a-6a. The Eleventh Circuit held, likewise "as a matter of law," that they are liable. App. 5a. With respect to the Question Presented—whether an aligned, prevailing party is liable to pay a co-party's attorney's fees—only two facts in this case matter: (1) that Pope successfully moved to terminate the No-Bypass Rule; and (2) that the State defendants did, too. Alignment—or the absence of adverseness—is the only pertinent fact, and it is uncontested.

2. The Question Presented, while extraordinarily important to the workaday world of litigation, is, within the context of this case, discrete. Again, the State defendants "offer no challenge to the district court's attorney's fee calculation"; instead, they argue simply "that as a matter of law no attorney's fees may be awarded" against an aligned, prevailing party. App. 4a. Accordingly, the Court needn't concern itself with the fact-intensive, multipart balancing tests used to determine fee amounts. It needs only to focus on a straight question of statutory interpretation.

3. The Eleventh Circuit's resolution of the Question Presented—to allow assessments of fees against aligned, prevailing parties—was unquestionably outcome-determinative. Had the Eleventh Circuit applied the Second, Seventh, and D.C. Circuit precedent cited to it by the State defendants, it would have denied Pope's fee request outright.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals, Eleventh Circuit.
UNITED STATES of America, Plaintiff,
Timothy D. Pope, Intervenor-Plaintiff-Appellee,
Johnny Reynolds, et al., Intervenor-Plaintiffs,
v.
Thomas G. FLOWERS, et al., Defendants,
State of Alabama Personnel Department, Defendant-Appellant.
No. 07-14854
Non-Argument Calendar.

June 18, 2008.

Before EDMONDSON, Chief Judge, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Defendants-Appellants, the Alabama State Personnel Board, other Alabama State Departments and named State employees (collectively the "State defendants"), appeal an award of attorney's fees to Intervenor-Appellee, Timothy D. Pope. No reversible error has been shown; we affirm.

In 1968, the United States brought an enforcement action against the State defendants alleging a pattern or practice of racial discrimination in employment. In 1970, the district court found the defendants liable and entered injunctive orders designed to remedy the illegal discriminatory practices. *See United States v. Frazer*, 317

F. Supp. 1079 (M.D. Ala. 1970) (the "Frazer litigation"). Those injunctive orders set out an extensive remedial framework to redress discrimination. Part of that framework became known as the Frazer No-bypass Rule: Alabama state officials were prohibited from bypassing a higher ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. The Frazer No-bypass Rule remained in effect for over thirty years without court review or reauthorization.

Timothy Pope is a white employee of the Alabama Department of Corrections. In September 2002, Pope was offered a promotion but that promotion was rescinded as violative of the No-bypass Rule. Pope filed a race discrimination charge, received a right-to-sue letter, and is the plaintiff in a Title VII case pending in district court. In addition to his Title VII suit, Pope, on 25 February 2003, moved to intervene in the Frazer litigation; Pope asserted, among other things, that the No-bypass Rule was unconstitutional and must be modified or ended.

That the State defendants commenced a review of the continuing necessity of the No-bypass Rule in May 2002, well *before* Pope moved to intervene is undisputed. Those efforts included preparation of a detailed (and costly) statistical analysis of the racial composition and recent racial hiring patterns in the Alabama public workforce. On 11 February 2003, the State defendants began discussions with the United States about the results of the statistical analysis and proposed to file a joint motion to terminate the No-bypass Rule on the grounds that the problems addressed in the Frazer litigation had been remedied. Because discussions were in process, the State defendants and the United States sought addi-

tional time to respond to Pope's intervention motion. On 20 May 2003, the State defendants and the United States filed a joint motion to terminate the No-bypass Rule; on that same date, they each filed answers opposing Pope's motion to intervene on the ground that Pope's interests were adequately represented by the existing parties. On 22 May 2003, a motion to intervene to support the continued efficacy of the No-bypass Rule was filed on behalf of African-American employees and applicants. On 20 January 2004, the district court granted both intervention motions under the permissive intervention provisions of Fed. R. Civ. P. 24(b).

On 20 May 2005, the district court granted a motion filed by Pope and supported by the State defendants and the United States to enjoin preliminarily the operation of the No-bypass Rule. At that time, the district court only suspended the Rule so that the African-American intervenors would have the opportunity to refute the district court's initial assessment that the No-bypass Rule no longer passed constitutional muster. On 30 June 2006, the district court permanently terminated the Rule. Pope sought attorney's fees and expenses totaling $105,317.82; the district court awarded $61,499.70.

The State defendants argue that the district court erred as a matter of law in concluding that Pope was a prevailing party vis-à-vis the State defendants;[1] according to the State defendants the interests of the State and Pope were aligned: both parties were successful in their efforts to terminate the No-bypass Rule. And the State defendants maintain that even if Pope could be consid-

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[1] In civil rights litigation, the district court may award the prevailing party, other than the United States, reasonable attorney's fees. 42 U.S.C. § 1988(b).

ered a prevailing party for fee award purposes, special circumstances make such an award manifestly unjust.

We review a district court's award of attorney's fees and costs for abuse of discretion, with underlying questions of law reviewed de novo and factual findings reviewed for clear error. *See Smalbein ex rel. Estate of Smalbein v. City of Daytona Beach*, 353 F.3d 901, 904 (11th Cir. 2003). The State defendants argue that as a matter of law no attorney's fees may be awarded; they offer no challenge to the district court's attorney's fee calculation.

A party in civil rights litigation is a prevailing party for fee-shifting purposes if success has been attained on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (quotation and citation omitted). Key to the determination of prevailing-party status is whether the party achieved "a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 1493, 103 L.Ed.2d 866 (1989). When Pope moved to intervene in the Frazer litigation, the No-bypass Rule was being applied to promotion decisions made by the State defendants and thus to Pope as an employee of the Department of Corrections. As a consequence of litigation acts taken by Pope and the State defendants, the No-bypass Rule has been terminated judicially. There can be no doubt that there has been a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 1840, 149 L.Ed.2d 855 (2001). Pope was a prevailing party.

The State defendants seek to engraft a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status. But we see nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture.[2] The district court found and concluded expressly that Pope made a separate contribution to the litigation, that Pope's belief that his presence in the litigation was necessary was a reasonable belief, and that Pope's contribution was a substantial force in the court's decision to suspend the No-bypass Rule.[3] Because Pope's efforts contributed to a change in the State defendants' personnel practices, we see no error in the district court's determination that Pope was a prevailing party—and a prevailing party vis-à-vis the State defendants—for purposes of a fee award.

The State defendants argue that, even if Pope properly is considered a prevailing party, special circumstances render a fee award unjust. The State defendants argue correctly that a court may deny an award of attorney's fees to an otherwise prevailing party when special

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[2] The State defendants cite *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), for the position that fee applications are to be denied in civil rights litigation when the interests of the party seeking fees are aligned with the party against whom the fees are to be assessed. In *Reeves*, the defendants remained neutral on issues raised by plaintiffs in plaintiffs' efforts to defend a consent decree against third party attack. The attorney's fee applicant in *Reeves* sought no—and achieved no—change in the legal landscape.

[3] From the outset, Pope argued the unconstitutionality of the No-bypass Rule whereas the State defendants focused on statistical evidence to terminate the Rule. Pope's argument was of substantial import in suspending the Rule; Pope's argument was of more limited import in the final decision to terminate the Rule.

circumstances would render an award unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1937, 76 L.Ed.2d 40 (1983); *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985), *abrogated on other grounds by Texas State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 1489, 103 L.Ed.2d 866 (1989) ("it is accepted jurisprudence that federal statutes which permit an award of attorney's fees to prevailing parties in selected litigation are subject to a special circumstances provision"). The defendant bears the burden of establishing that special circumstances render a fee award unjust, *Martin*, 773 F.2d at 1150; and this judicially created exception to the statutory fee provision is to be narrowly construed. *Id.*

We see no abuse of discretion in the award of fees under the circumstances of this case. The special circumstances cited by the State defendants—that the State defendants' efforts to terminate the No-bypass Rule predated Pope's intervention, that the parties' interests were aligned, that Pope's contribution was largely redundant, that the State incurred considerable expense in compiling the statistical data upon which the district court relied in the final termination decision, that the State defendants were under legal compulsion to apply the No-bypass Rule until the district court ruled otherwise, and that Pope's intervention was "claim jumping"—are either contrary to the district court's findings, or are already accounted for by the district court's deductions from the fee request, or otherwise fail to persuade us that the district court abused its discretion when it failed to apply the narrow special circumstances exception to the fee award statute.

AFFIRMED.

United States District Court, M.D. Alabama, Northern Division.

UNITED STATES of America, Plaintiff,
Timothy D. Pope, Plaintiff-Intervenor,
Johnny Reynolds, et al., Plaintiff-Intervenors,
Eugene Crum, Jr., et al., Plaintiff-Intervenors,
v.
Tommy G. FLOWERS, et al., Defendants.
Alabama State Conference of NAACP Branches, Amicus Curiae.

Civil Action No. 2:68cv2709-MHT.

Sept. 17, 2007.

OPINION AND ORDER

MYRON H. THOMPSON, United States District Judge.

Previously, the court terminated the judicially imposed no-bypass rule, which, in general, had since 1970 prohibited Alabama state officials from by-passing a higher-ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. *United States v. Flowers (Flowers II)*, 444 F.Supp.2d 1192 (M.D. Ala. 2006) (Thompson, J.); *United States v. Flowers (Flowers I)*, 372 F.Supp.2d 1319 (M.D. Ala. 2005) (Thompson, J.). This long-standing litigation, brought by plaintiff United States of America and naming several officials of the State of Alabama as defendants, is again before the court, this time on motions for attorneys' fees and expenses, filed by plaintiff-intervenor Timothy D. Pope, a white employee of the Alabama Department of Corrections who had claimed that he had

been denied a promotion because of the no-bypass rule. For the reasons given below, of Pope's requested $105,317.82 for fees and expenses from the state defendants, the court will award $61,499.70.

I. BACKGROUND

The relevant facts, chronologically, are as follows:

May 2002: In order to determine whether the no-bypass rule was still necessary, the state defendants hired statistical experts to examine the racial composition of the Alabama workforce as well as the racial patterns of recent selections in the workforce.

February 11, 2003: The state defendants initiated discussions with the United States about the results of the report of the experts.

February 25, 2003: Pope filed a motion to intervene.

March 20 and 27, 2003: The United States filed a motion to hold Pope's intervention motion in abeyance for 45 days, and the motion was granted.

March 20, 2003: The United States and the state defendants filed a joint motion to terminate the no-bypass rule.

May 22, 2003: Representatives of African-American employees of the State of Alabama moved to intervene.

January 20, 2004: Pope and the African-American representatives were all allowed to intervene.

February 28, 2004: Pope filed a complaint-in-intervention and a motion seeking, essentially, to terminate the no-bypass rule.

March 12, 2004: The African-American representatives filed a complaint-in-intervention.

April 29, 2005: The court entered an order requiring that the parties show cause as to why the motions to terminate the no-bypass rule, filed by the United States, the state defendants, and Pope should not be treated as requests for preliminary relief and why the no-bypass rule should not be preliminary enjoined, that is, suspended. *Flowers I*, 372 F.Supp.2d at 1322-25.

May 9, 2005: Pope filed a motion for preliminary injunctive relief.

May 20, 2005: The court treated the United States and the defendants' joint motion to terminate as a motion for preliminary relief; granted that preliminary-relief motion as well as Pope's preliminary-relief motion; and suspended the no-bypass rule pending final resolution of the challenges to the rule. *Id.* at 1325-26.

June 1, 2005: Pope filed a motion for award of attorneys' fees as follows:

ATTORNEYS	RATE	HOURS	AMOUNT
Raymond Fitzpatrick, Jr.	$300	62.25	$18,675.00
J. Michael Cooper	225	12.00	2,700.00
R. Scott Clark	225	141.25	31,781.25
Gary L. Brown	175	150.50	26,337.50
SUBTOTAL			$79,493.75
Expenses			$4,899.90
TOTAL			$84,393.65

September 9, 2005: Pope and the state defendants filed motions for summary judgment.

June 30, 2006: After substantial discovery, the court entered an opinion and judgment granting the summary-judgment motions, granting the motions to terminate the no-bypass rule, and permanently terminating the rule. *Flowers II*, 444 F.Supp.2d at 1193-94.

July 12, 2006: Pope filed a supplemental motion for award of attorneys' fees as follows:

ATTORNEYS	RATE	HOURS	AMOUNT
Raymond Fitzpatrick, Jr.	$300	23.25	$6,975.00
J. Michael Cooper	225	9.75	2,193.75
R. Scott Clark	225	7.50	1,687.50
Gary L. Brown	175	57.00	9,975.00
SUBTOTAL			$20,831.25[1]
Expenses			$92.92
TOTAL			$20,924.17

Pope is therefore seeking $79,493.75 in fees and $4,889.90 in expenses in his first motion and $20,831.25 in

[1] In his brief, Pope shows a total fee of $20,706.25, but, when the court multiplies the number of hours listed times the rates requested, it gets a total fee of $20,831.25, a difference of $125.00.

fees and $[illegible].92 in expenses in his second motion, for a total sum of $105,317.82.

II. LEGAL STANDARD FOR ATTORNEY'S FEES

In federal civil-rights litigation, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b); *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L.Ed.2d 855 (2001) (statutory fee-shifting provisions from different statutes have been interpreted consistently). "Determining a plaintiff's entitlement to attorney fees entails a three-step process. First, a court asks if the plaintiff has 'prevailed' in the statutory sense. Second, the court calculates the 'lodestar,' which is the number of hours (tempered by billing judgment) spent in the legal work on the case, multiplied by a reasonable market rate in the local area. Finally, the court has the opportunity to adjust the lodestar to account for other considerations that have not yet figured in the computation, the most important being the relation of the results obtained to the work done." *Dillard v. City of Greensboro*, 213 F.3d 1347, 1353 (11th Cir. 2000) (citations omitted).

The fee applicant bears the burden of "establishing entitlement and documenting the appropriate hours and hourly rates." *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988). This burden includes supplying the court with specific and detailed evidence from which it can determine the reasonable hourly rate, maintaining records to show the time spent on the different claims, and setting out with sufficient particularity the general subject matter of the time expendi-

tures so that the district court can assess the time claimed for each activity. *ACLU v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999).

A fee applicant should also exercise "'billing judgment,'" *id.* at 428 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983)). That is, the applicant should "exclude from his fee applications 'excessive, redundant, or otherwise unnecessary [hours],' which are hours 'that would be unreasonable to bill to a client and therefore to one's adversary irrespective of the skill, reputation, or experience of counsel.'" *Id.* (quoting *Norman*, 836 F.2d at 1301) (citation omitted).

"Those opposing fee applications have obligations, too. In order for [district] courts to carry out their duties in this area, 'objections and proof from fee opponents' concerning hours that should be excluded must be specific and 'reasonably precise.'" *Id.* (quoting *Norman*, 836 F.2d at 1301).

In making the above determinations, the court is guided by the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)[2], and approved in *Blanchard v. Bergeron*, 489 U.S. 87, 91-92, 109 S. Ct. 939, 103 L.Ed.2d 67 (1989). These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the

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[2] In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

III. APPLICATION OF LEGAL STANDARD

The state defendants argue that "Pope is not a 'prevailing party' *vis-a-vis* [them] because the State [did not] oppose[] Pope's motion to terminate the no-bypass rule." Defendants' memorandum of law (doc. no. 782) at 2. The state defendants explain that they "commenced their work to vacate the no-bypass rule almost a year before Pope sought to intervene in this action," *id.*, and that they, "joined by the United States, aggressively litigated their motion to a successful conclusion." *Id.*

In *Buckhannon Bd. & Care Home, Inc., v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L.Ed.2d 855 (2001), the United States Supreme Court held that a party is a "prevailing party" for fee-shifting purposes if he has achieved a sought-after "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 600. Here, this court did not grant the United States and the state defendants' joint motion to terminate the no-bypass rule and then deny Pope's termination motion as moot; instead, the court granted both motions. While Pope may not have achieved the sought-after change by himself, he still achieved it. Pope is a prevailing party. This conclusion does not mean, however, as explained below, that he is entitled to all his requested fees.

The first component of the lodestar figure is the number of hours reasonably expended. To determine this number the court relies primarily on the first *Johnson* factor, the amount of time and labor required. The state defendants maintain that most, if not all, of Pope's fees should be denied because his work was unnecessary to the litigation. The court agrees with the state defendants that to the extent that Pope's participation in this lawsuit was unnecessary or redundant, his time and hours should be reduced. *Cf. Ass'n of Disabled Americans v. Neptune Designs, Inc.*, 469 F.3d 1357, 1360 (11th Cir. 2006) ("Where the factual record supports a finding that the plaintiff filed or maintained a suit unnecessarily, a district court may properly consider such a finding in setting the amount of attorneys fees."). Therefore, the critical issue for the court is whether Pope's time and labor were redundant of that expended by the United States and the state defendants, or, to put the issue differently, whether Pope made a separate contribution to the litigation, and, if so, what it was.

First, the state defendants observe that they began their efforts to terminate the no-bypass rule in May 2002. However, it must remembered that, when Pope filed his motion to intervene in February 2003, the rule still applied to him, and, indeed, according to him, he had been, and continued to be, denied promotions because of the rule. He therefore had a *live* and *real* dispute with the State at that time. He should not have been expected to wait on the sidelines to see if the state defendants would follow through with their efforts to terminate the rule; moreover, Pope could not be certain that the state defendants would not agree to modify, rather than terminate the rule, in the wake of a significant challenge—a challenge which, in fact, came to bear when the

African-American representatives intervened. Hindsight might suggest that at some point in the future the outcome of this litigation would have been the same without Pope's presence in this litigation; but foresight, at the time Pope sought to intervene, provided no such certainty. Pope's belief that his presence in this litigation was necessary was reasonable.

Next, the state defendants argue that Pope made the same arguments that they did in support of terminating the no-bypass rule; sought the same relief that they did; and relied on their workforce composition evidence. This argument, essentially, puts at issue whether Pope made any separate contribution to the litigation other than his presence. The court, after revisiting the record in this case, believes that Pope did, albeit to only a limited extent.

In orders entered on April 29 and May 20, 2005, this court stated that, because the no-bypass rule, which had been in effect for approximately 35 years, "is a race-conscious provision and, as such, must meet 'strict scrutiny' standards and must be 'narrowly tailored,' *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995)," *Flowers I*, 372 F.Supp.2d at 1323, and, because, "if logic and common sense are to apply, the no-bypass rule cannot be both narrowly tailored and everlasting," *id.*, the rule "cannot continue without a court finding that it continues to meet the demanding requirements for race-conscious relief." *Id.* With regard to the evidence submitted by the United States and the state defendants, the court stated the "the important question is whether the picture of race-relations in the government of the State of Alabama has reached the critical point where claims of race discrimination can be adequately addressed through traditional

federal remedies, such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, and the Civil Rights Act of 1866, 42 U.S.C.A. § 1981; the current record strongly suggests that that picture, albeit perhaps a very imperfect one, has reached that point." *Flowers I*, 372 F.Supp.2d at 1324.

So as to give the African-American representatives an opportunity to cure the defect, that is, that the rule had not been reviewed and re-authorized by a court during it extended existence, and so as to give them an opportunity to refute the evidence submitted by the United States and the state defendants, the court entered a preliminary injunction that only suspended the rule. *Id.* at 1325.

On June 30, 2006, relying principally on evidence submitted by the African-American representatives, the United States, and the state defendants, the court entered a final opinion and judgment that concluded that the no-bypass rule, "while narrowly tailored when imposed to redress the State's across-the-board discrimination at that time, is no longer narrowly tailored to redress the specific types of alleged racially discriminatory practices identified by the African-American intervenors today." *Flowers II*, 444 F.Supp.2d at 1194. "Those alleged practices may still need fixing," the court continued, "but the no-bypass rule is no longer one of the appropriate tools; there is no longer a fit between the alleged practices and the rule." *Id.* The court found, among other things, that "the percentage of African-Americans in 2003 in the state workforce rose to 39; while, at the same time, between 1983 and 2003, the percentage of African-Americans in the lowest pay-grade groups decreased from 48 (as opposed to 23 for whites)

to 11 (as opposed to 8 for whites), and, in general, there was a substantial redistribution of African-Americans into jobs categories with higher, and even the highest, earning potential. Thus, all experts agree "that the percentage of African American employees in the State of Alabama workforce has increased from 1970 to 2003 and that the distribution of these employees has changed from lower skilled positions to higher skilled positions, and consequently, higher paying, ... categories." *Id.* at 1193-94 (footnote omitted). The court therefore permanently terminated the rule. *Id.* at 1194.

Pope's forceful position in this case, that the no-bypass rule was unconstitutional on its face and should be terminated immediately without consideration of any evidence from any of the other parties, played a substantial role in convincing the court that the rule should be suspended early, that is, pending final resolution of the challenges to it. Pope can therefore take substantial, but not total, credit toward the early suspension of the rule. However the court's final termination of the rule, after all evidence had been completed, was driven more by the arguments and evidence of the United States and the state defendants. Pope's contribution to the litigation at this stage was significantly less.

As to Pope's first, June 2005, fee petition, therefore, the court believes that, with exceptions to be discussed in the next paragraph, the hours and labor expended by Pope during the period leading up to the no-bypass rule's suspension are reasonable and should be recovered to the extent of 70%. The remaining 30% was redundant of the work done by the United States and the state defendants.

Two of the exceptions to the amount requested for

the first fee petition are for work done by Pope on (1) the unsuccessful motion by others to intervene and (2) his unsuccessful motion for class certification. This work was unnecessary, and the fee on his first petition should be reduced by $9,037.50, which reflects the hours spent on these items. A third exception is the $12,850.00 fee for the amount of time litigating fees for the first petition. While fees for litigating fees are recoverable, *Jackson v. State Bd. of Pardons & Paroles*, 331 F.3d 790, 799 (11th Cir. 2003), this amount is excessive when considered in light of Pope's contribution to the merits of this litigation and when considered for reasonable in general; it will be reduced by $5,000.00.

The court therefore calculates the lodestar for the first fee petition as follows:

Requested amount for non-fee work ($79,493.75-12,850.00)	$66,643.75
Less time for work done on unsuccessful intervention and class certification	9,037.50
SUBTOTAL	$57,606.25
Less 30% for redundant work ($57,606.25 x .30)	17,281.87
SUBTOTAL	$40,324.38
Plus the reduced amount for litigating fees ($12,850-5,000.00)	7,850.00
TOTAL	$48,174.38

As to the second, July 2006, fee petition, as the court has stated, Pope's contribution to the litigation at this

stage was significantly more limited. In addition, his fees for litigating fees approaches 50% of the fee petition and is excessive when considered in light of Pope's overall contribution to the merits of this litigation and when considered for reasonableness in light of the total fees for litigating fees in the wake of the state defendants' challenge to the fees. The court will therefore allow him to recover only 40% of the total amount requested, that is, $8,332.50 ($20,831.25 x .40). He may recover 10%, that is, $2,083.13 ($20,831.25 x .10), for fees on the merits; he may recover 30%, that is, 6,249.37, ($20,831.25 x .30), for fees for fees.

The *Johnson* factors as well as the other considerations listed above as part of the legal standard for determining a reasonable fee, to the extent they have not been subsumed in the discussion above, do not warrant an adjustment of the fee petitions. The expenses requested in both fee petitions are reasonable and fully recoverable.

The total amount recoverable in this case is therefore calculated as follows:

First fee petition		
Time and labor	$48,174.38	
Expenses	4,899.90	
SUBTOTAL	$53,074.28	$53,074.28
Second fee petition		
Time and labor	$8,332.50	
Expenses	92.92	
SUBTOTAL	$8,425.42	$8,425.42
TOTAL		$61,499.70

Also, the court, looking at the big picture rather than just its parts, concludes that this total fee of $61,499.70 is reasonable and should be awarded to Pope from the state defendants.

* * *

Accordingly, for the above reasons, it is ORDERED that plaintiff-intervenor Timothy D. Pope's motions for award of attorneys fees and expenses (Doc. Nos. 740 & 781) are granted to the extent that plaintiff-intervenor Pope shall have and recover from defendants Tommy G. Flowers, et al., the total sum of $61,499.70 for fees and expenses.

United States District Court, M.D. Alabama, Northern Division.

UNITED STATES of America, Plaintiff,
Timothy D. Pope, Plaintiff-Intervenor,
Johnny Reynolds, et al., Plaintiff-Intervenors,
Eugene Crum, Jr., et al., Plaintiff-Intervenors,
v.
Tommy G. FLOWERS, et al., Defendants.
Alabama State Conference of NAACP Branches, Amicus Curiae.

Civil Action No. 2:68cv2709-MHT.

June 30, 2006.

OPINION

MYRON H. THOMPSON, District Judge.

The issue before the court is whether, after approximately a third of a century, the court-imposed no-bypass rule should be terminated. In general, the rule prohibits Alabama state officials from bypassing a higher-ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. Because there are no disputed issues of material fact, *see* Fed. R. Civ. P. 56, and for the reasons given below, the court concludes that a summary judgment terminating the rule should be entered.

On May 20, 2003, plaintiff United States of America was joined by the defendants, who are officials of the State of Alabama, in filing a motion to terminate the no-bypass rule. This court granted permissive intervention

to representatives of two groups of African-American employees of the State of Alabama, and to Timothy Pope, a white employee of the Alabama Department of Corrections who says he was denied a promotion because of the no-bypass rule. On January 28, 2004, Pope joined the United States and the state defendants in their termination motion. Previously, on May 20, 2005, the court suspended, as opposed to terminating, the rule so as to allow the African-Americans intervenors to complete discovery on the issue. *United States v. Flowers*, 372 F.Supp.2d 1319 (M.D. Ala. 2005) (Thompson, J.).

Now that all relevant evidence has been presented, the court finds that the requirements of Rule 60(b) of the Federal Rules of Civil Procedure and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 116 L.Ed.2d 867 (1992), have been met, that is, there has been a "significant change in [factual] circumstances" and termination of the no-bypass rule is "suitably tailored" to these changed circumstances. *Id.* at 383, 112 S. Ct. 748. As this court has stated, the no-bypass rule was "imposed in response to evidence that, up until 1970, the State of Alabama was unabashedly refusing to hire and promote African-Americans to almost any and all nonmenial positions in state government because of their race." *Flowers*, 372 F.Supp.2d at 1323. The rule was part of an extensive remedial order to redress this discrimination.

In contrast, the current record reflects "that the racial make-up of Alabama's government is dramatically different from what it was in 1970, when the no-bypass rule was imposed." *Id.* at 1324. More specifically, and for example, the percentage of African-Americans in 2003 in the state workforce rose to 39; while, at the same time, between 1983 and 2003, the percentage of African-

Americans in the lowest pay-grade groups decreased from 48 (as opposed to 23 for whites) to 11 (as opposed to 8 for whites), and, in general, there was a substantial redistribution of African-Americans into job categories with higher, and even the highest, earning potential. Thus, all experts agree "that the percentage of African American employees in the State of Alabama workforce has increased from 1970 to 2003 and that the distribution of these employees has changed from lower skilled positions to higher skilled positions, and consequently, higher paying, ... categories."[1]

To be sure, as the African-American intervenors observe, the evidence also reflects that African-Americans have still not achieved parity with whites in the overall state workforce and in certain parts of that workforce. However, the intent of the no-bypass rule was not to achieve racial parity, *see Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) ("The Constitution does not guarantee racial parity in public employment"); rather, it was to help in redressing the State's across-the-board discrimination in employment, including specifically the State's intentional bypassing of higher-ranked African-American applicants in favor of a lower-ranked white applicants so as to limit African-Americans to menial jobs. The intent was to knock down the State's wall of racial discrimination.

The African-American intervenors also note that their statistical evidence suggests that there may still be discriminatory practices in other aspects of the State's selection process and even in some state agencies; this evidence further suggests significant pay disparities be-

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[1] African-American intervenors' brief (Doc. No. 737), at 13 (citations and quotation marks omitted).

tween African-Americans and whites within some job categories. "[T]he no-bypass rule is a race-conscious provision and, as such, must meet 'strict scrutiny' standards and must be 'narrowly tailored,' *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995)." *Flowers*, 372 F.Supp.2d at 1323. The across-the-board rule, while narrowly tailored when imposed to redress the State's across-the-board discrimination at that time, is no longer narrowly tailored to redress the specific types of alleged racially discriminatory practices identified by the African-American intervenors today. Those alleged practices may still need fixing, but the no-bypass rule is no longer one of the appropriate tools; there is no longer a fit between the alleged practices and the rule.[2]

An appropriate judgment will be entered.

DONE, this the 30th day of June, 2006.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Intervenor Timothy D. Pope's motion for summary judgment (doc. no. 757) and the State defendants

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[2] Indeed, it is arguable that the African-American intervenors may have overstated their case. Their evidence suggests that some of the alleged practices and disparities they identify have remained and continued unallayed by the no-bypass rule, thereby suggesting the rule has been ineffective as to these practices and disparities. Therefore, to the extent these alleged practices and disparities need a remedy, they need a new one more tailored to them than the no-bypass rule.

motion for summary judgment (doc. no. 759) are granted.

(2) Plaintiff United States of America and the State defendants' joint motion to terminate no-bypass provisions of injunctive orders (doc. no. 634) and intervenor Pope's motion to modify injunction (doc. no. 659) are granted.

(3) The application of the no-bypass rule in this litigation is permanently terminated.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE, this the 30th day of June, 2006.

United States District Court, M.D. Alabama, Northern Division.

UNITED STATES of America, Plaintiff,
Timothy D. Pope, Plaintiff-Intervenor,
Johnny Reynolds, et al., Plaintiff-Intervenors,
Eugene Crum, Jr., et al., Plaintiff-Intervenors,
v.
Tommy G. FLOWERS, et al., Defendants.
Alabama State Conference of NAACP Branches, Amicus Curiae.

Civil Action No. 2:68cv2709-T.

May 20, 2005.

ORDER

MYRON H. THOMPSON, District Judge.

This litigation, *United States v. Flowers*, civil action no. 2:68cv2709-T (previously styled *United States v. Frazer*, and still frequently known today as "*Frazer*" or the "*Frazer* litigation"), is before the court on the difficult issue of what discovery, if any, the court should allow before it decides whether *Frazer's* 35-year-old "no-bypass rule" should be terminated.

I.

Paragraph 3 of § II of the 1970 injunction in *Frazer* provides as follows:

> "Defendants shall not appoint or offer a position to a lower-ranking white

> applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable. In every instance where a determination is made that the Negro applicant is unfit or unavailable, documentary evidence shall be maintained by the defendants that will sustain that finding."

United States v. Frazer, 317 F. Supp. 1079, 1091 (M.D. Ala. 1970). This provision, which embodies what is now called the no-bypass rule, prohibits Alabama state officials from bypassing a higher-ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. The rule was imposed in response to evidence that, up until 1970, the State of Alabama was unabashedly refusing to hire and promote African-Americans to almost any and all non-menial positions in state government because of their race.

On May 20, 2003, plaintiff United States of America was joined by the defendants, who are officials of the State of Alabama, in filing a motion to terminate the no-bypass rule. This court granted permissive intervention to representatives of African-American employees of the State of the State of Alabama, and to Timothy Pope, a white employee of the Alabama Department of Corrections who says he was denied a promotion because of the no-bypass rule. On January 28, 2004, Pope joined the United States and the state defendants in their termina-

tion motion.

This court instructed the parties to agree on a discovery plan, but they could not do so. The United States, the state defendants, and Pope argued that discovery should be limited to an analysis of the data underlying the statistical report that the original parties had submitted, which purports to show that the no-bypass rule is no longer necessary. The African-American intervenors wanted discovery to be much broader, encompassing information about specific instances of alleged discrimination across the State government; they argued that the question of whether the no-bypass rule was still necessary could require an agency-by-agency or classification-by-classification analysis.

This court initially approved the more limited proposed discovery plan of the United States, the defendants, and Pope. However, the court left open the possibility that it would allow more discovery after reviewing the African-American intervenors' rebuttal report.

II.

The discovery dispute presented to the court is difficult because the court is confronted with two serious and competing concerns. On the one hand, the court is very reluctant to foreclose further discovery by the African-American intervenors, for the court would be essentially ruling on the merits of the issue presented without having given all interested parties an opportunity to develop their case. Further discovery and court action is warranted on, at least, the important issues presented pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993).

On the other hand, the court is confronted with the following reality: First, the no-bypass rule is a race-conscious provision and, as such, must meet "strict scrutiny" standards and must be "narrowly tailored," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995); if logic and common sense are to apply, the no-bypass rule cannot be both narrowly tailored and everlasting. Second, the rule has been in effect for approximately 35 years without an independent court review to determine if it continues to meet legal requirements. Because the rule cannot be everlasting, this circumstance is impermissible; in other words, the rule simply cannot continue without a court finding that it continues to meet the demanding requirements for race-conscious relief. Third and finally, the evidentiary record submitted by United States and state defendants shows a strong likelihood that, when all is said and done, the rule cannot continue. Although the court recognizes that the African-American intervenors maintain that Alabama has not progressed enough to warrant the rule's termination, it cannot be discounted that the racial make-up of Alabama's government is dramatically different from what it was in 1970, when the no-bypass rule was imposed.

In resolving these competing concerns, the court concludes that it should be guided by the standards developed for issuing a preliminary injunction. Generally, a preliminary injunction should be entered if the movant clearly establishes that (1) there is a substantial likelihood of success on the merits, (2) irreparable injury will be suffered unless the injunction issues, (3) threatened injury to the movant outweighs whatever damage proposed injunction may cause the opposing party, and (4) the injunction, if issued, would not be adverse to the pub-

lic interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1307 (11th Cir. 1998). "Ordinarily the first factor is most important." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). This court believes that, with these standards tailored to the circumstances of this case, the United States, the state defendants, and Pope have met them.

As indicated above, there is not only a likelihood, but a strong likelihood, that the United States, the state defendants, and Pope will prevail on the merits of their motions. In light of the substantial positive change in the racial makeup of the government of the State of Alabama after the uninterrupted implementation of the no-bypass rule for 35 years, the court believes that the record strongly suggests that, on balance, the African-American intervenors will not suffer substantial harm from the mere temporary cessation of the no-bypass rule pending the resolution of the pending substantive motions. And in light of the Supreme Court's strong mandate that all race-conscious relief must be narrowly tailored, the court further believes that the record strongly suggests that the continued implementation of the no-bypass rule would cause irreparable injury to all state employees and applicants for state jobs, and thus would be against the public interest, in the absence of an independent and compelling finding by the court that such race-conscious relief is still warranted after having been implemented for over a third of a century.

The court, however, recognizes that the African-American intervenors believe that the State has not progressed enough and, in fact, there may be evidence that some state officials have intentionally used devices (such a manipulation of registers and giving everyone the same score) so as to circumvent the no-bypass rule. But the

important question is whether the picture of race-relations in the government of the State of Alabama has reached the critical point where claims of race discrimination can be adequately addressed through traditional federal remedies, such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, and the Civil Rights Act of 1866, 42 U.S.C.A. § 1981; the current record strongly suggests that that picture, albeit perhaps a very imperfect one, has reached that point.

This court therefore tentatively concludes that it should *preliminarily* and *immediately* discontinue the no-bypass rule. However, because the court's approach in this case has not been informed by the parties (in particular, the African-American intervenors), the court will not make a final decision on whether the no-bypass rule should be suspended without hearing first from all concerned.

Accordingly, it is ORDERED that all parties show cause, if any there be, in writing by no later than May 9, 2005, as to the following:

(1) Why plaintiff United States of America and the state defendants' joint motion to terminate the no-bypass rule (Doc. No. 634) and plaintiff-intervenor Timothy Pope's motion to modify injunction as to the no-bypass rule (Doc. No. 659) should not be treated as also requests for preliminary relief; and

(2) Why said requests for preliminary relief should not be granted as outlined in this order.

It is further ORDERED that, by no later than May 20, 2005, the court will resolve whether preliminary relief should be granted.

In a companion order entered today the court addresses what discovery is allowed on plaintiff United States of America and the state defendants' joint motion to terminate the no-bypass rule (Doc. No. 634) and on plaintiff-intervenor Pope's motion to modify injunction as to the no-bypass rule (Doc. No. 659).

DONE, this the 29th day of April, 2005.

ORDER

This litigation is again before the court, this time on whether the court should implement the preliminary relief suggested in its show-cause order of April 29, 2005.[1] The defendants agree to the relief; intervenor Timothy Pope not only agrees to the relief, he has also filed a motion expressly asking for such relief; plaintiff United States of America opposes the interim relief and instead requests that the no-bypass rule be terminated immediately and permanently without allowing for any additional discovery and without resolving any of the currently pending discovery disputes; and the African-American intervenors oppose any relief, preliminary or permanent.

For the reasons stated in the court's April 29 order and based on Pope's motion, the court will grant the suggested preliminary relief. The court, however, makes these additional findings. First, for the reasons set forth in the court's April 29 order and pursuant to Fed.R.Civ.P. 60(b), the defendants and Pope have established "that a significant change in circumstances war-

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[1] Two orders were entered on April 29. One contained suggested preliminary relief (Doc. No. 723), and the other set forth a framework for discovery (Doc. No. 724).

rants" a suspension of the no-bypass rule. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383, 112 S. Ct. 748, 760, 116 L.Ed.2d 867 (1992). More specifically, there has been "a significant change ... in factual conditions [and] in law," *id.* at 383, 112 S. Ct. at 760; and the "proposed [preliminary] modification is suitably tailored to the changed circumstance." *Id.*

Second, the court rejects the African-American intervenors' contention that it has not made specific findings of fact and reached specific conclusions of law to support the interim relief. This order and the April 29 order provide such.

Third, the African-American intervenors have had sufficient time and opportunity to develop the record upon which the court relies. Indeed, to adopt the African-American intervenors' view, the court would essentially have to wait until all evidence has been developed, thereby defeating the necessary interim relief. As the court stated in its April 29 order, the continued implementation of the race-conscience, indeterminate, across-the-board no-bypass rule without any recent court review and re-authorization during its extended existence, is, on its face, unconstitutional.[2] By providing for only interim, rather than permanent, relief at this time, the court gives the African-American intervenors an opportunity to cure this defect, if they can; in the meantime, however, the rule simply cannot remain in effect.

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[2] In its April 29 order, the court said the continued need for the no-bypass rule had not been reviewed since 1970. The court was incorrect. In 1976, the no-bypass rule was extended to include other state departments and officials not included in the 1970 injunction. *United States v. Frazer*, 1976 WL 729 (M.D. Ala. Aug. 20, 1976). However, the conclusions reached by the court in its April 29 order remain unchanged.

Finally, the defendants take issue with a separate, discovery order entered on April 29 directing the magistrate judge "to see if a plan can be developed for more extensive, but still quite limited, discovery."[3] They argue that "the companion discovery order will almost certainly foment future discovery disputes that could quickly overwhelm the parties and the Court."[4] The court has not unconditionally directed the magistrate judge to develop a plan for more discovery. Rather, the magistrate judge is to work with the parties to see "if" a plan can be developed. In addressing this "if," the magistrate judge should consider not only whether any additional discovery is relevant but, if so, the defendants' articulated concern as well.

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The joint motion to terminate the no-bypass rule (Doc. No. 634) is treated as a motion for preliminary relief filed by defendants and said motion is granted.

(2) Plaintiff intervenor Timothy Pope's motion for preliminary relief (Doc. No. 732) is granted.

(3) Pending final resolution of the joint motion to terminate the no-bypass rule (Doc. No. 634) and the motion to modify injunction as to the no-bypass rule (Doc. No. 659), the application of the no-bypass rule is suspended, effective no later than June 20, 2005. The court assumes that the defendants need a reasonable period of time to put this suspension into effect in an orderly and fair manner.

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[3] Order entered April 29, 2005 (Doc. No. 724), at 3. *See also supra* note 1.

[4] Defendants' response (Doc. No. 725), at 3.

DONE, this the 20th day of May, 2005.

42 U.S.C. § 1988. Proceedings in vindication of civil rights

* * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

* * *

42 U.S.C. § 2000e-5. Enforcement provisions

* * *

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.